

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

DEVIN LAROY MOORE,	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	
	:	
SERGEANT MICHAEL JOHN	:	
VANGELO, et al,	:	
Defendants	:	NO. 03-4718

MEMORANDUM AND ORDER

Gene E.K. Pratter, J.

September 6, 2005

Defendants filed a Motion to Strike Plaintiff's Expert and Report as Untimely on August 8, 2005. According to Local Rule 7.1(c), Plaintiff Devin Moore had 14 days, or until August 22, 2005, to file a response or the Motion "may be granted as uncontested." As of this date, no response has been received.¹

¹ Counsel for Devon Moore has a history in this case of failing to meet various deadlines. A Motion to Dismiss was filed in this matter on October 24, 2003 before Judge Van Antwerpen. On November 6, 2003, Plaintiff filed a request for an extension to reply until December 20, 2003, which was granted. Plaintiff did not file his response until December 22, 2003 and requested additional time to file a supplemental brief. Plaintiff never filed a supplemental brief, despite being granted additional time by Judge Franklin S. Van Antwerpen, who was originally assigned this case prior to his appointment to the United States Court of Appeals for the Third Circuit, on December 29, 2003. The Motion to Dismiss was granted in part and denied in part on February 13, 2004.

This Court scheduled a status conference for October 29, 2004. Counsel contacted Chambers and requested a change of date because of his "involvement with the election." Counsel was told to contact opposing counsel to provide some alternate dates that work for both sides. Counsel failed to contact opposing counsel and they came to Chambers for the conference. A new date was set for November 10, 2004, but counsel once again had a conflict (after failing to return calls to the Court regarding available dates). A conference was finally held on December 14, 2004 and a Scheduling Order was issued on December 15, 2004.

On June 17, 2005, Defendants filed a Motion for Summary Judgment. Plaintiff failed to file a timely response, but, three days after his response was due, instead contacted counsel for the Defendants to request an extension of 10 days. Defendants did not oppose Plaintiff's request to have an extension until July 18, 2005 to respond, and the Court granted the extension on July 19, 2005 (in this Order, Plaintiff had until July 19, 2005 to file his response, but the Court contacted Mr. Karoly on July 18, 2005 to inform him that the Motion would be granted and to

Because there has been no response, the Court will grant the Motion as uncontested.

I. PROCEDURAL BACKGROUND

The Court issued a Scheduling Order on December 15, 2004, which required that Mr. Moore identify and submit curriculum vitae for all expert witnesses on or before April 29, 2005 and provide any expert report by May 13, 2005. Mr. Moore provided Dr. John Peters's curriculum vitae to opposing counsel on April 28, 2005, but did not provide any expert report to opposing counsel until it was attached as an exhibit to his response to the Motion for Summary Judgment on July 21, 2005. In Defendants' July 28, 2005 reply to Plaintiff's response, they noted that the report was untimely and stated that they intended to file this Motion. Mr. Moore did not file a sur-reply prior to the filing of this Motion nor has he otherwise responded to this Motion.

II. DISCUSSION

Mr. Moore has not filed a motion nor other submission requesting additional time to serve Defendants with the expert report. In fact, the expert report of Dr. Peters attached to Mr. Moore's response to the Motion for Summary Judgment is dated May 13, 2005, which would have been timely, if it had been provided to Defendants at that time. Mr. Moore has not provided any reason for the delay in providing the report to Defendants. See Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 896 (1990) ("any post deadline extension must be 'upon motion made,' and is permissible only where the failure to meet the deadline 'was the result of excusable neglect'")

file his submission by the end of July 19, 2005). The response was not filed until July 21, 2005. One of the alleged reasons for needing an extension until July 18, 2005 was because of newly discovered report that was "material to many of the issues raised in the case." Plaintiff did not cite to this report at any point in his 31 page response. In fact, Plaintiff failed to cite to any evidence except limited references to the Plaintiff's deposition.

(citations omitted).

Defendants contend that the delay is not an “excusable neglect” permitted under Federal Rule of Civil Procedure 6(b), because the delay has inexcusably prejudiced Defendants and, thus, delayed trial. See Pioneer Investment Servs. Co. v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380, 390-95 (1993) (discussing eight factors to consider when determining if the neglect that resulted in a delay was excusable). Further, according to Defendants, Mr. Moore has not set forth good cause for the delay nor expressed any good faith attempt to meet the deadline.

Mr. Moore’s failure to respond to this Motion timely, especially in light of the Defendants notice on July 28, 2005 of their plan to file such a motion, leads the Court to the conclusion that Mr. Moore is not contesting the Motion. Therefore, the Court will grant Defendants’ Motion as uncontested.

Nonetheless, a review of the record makes it apparent that the expert report was filed untimely. Mr. Moore has not cited to any “excusable neglect” and, even if Mr. Moore were to file a response providing such an excuse, the Court would be reticent to accept such an untimely response and finds that Defendants have been inexcusably prejudiced by the delay. Defendants have prepared a Motion for Summary Judgment and begun trial preparation under the assumption that Mr. Moore was not relying on any expert report. To “surprise” the Defendants with this report and provide them little time to properly prepare and respond, including having their own expert review the report, would be unjust and prejudicial.

III. CONCLUSION

For the foregoing reasons, the Court grants the Defendants' Motion to Strike Plaintiff's Expert and Report as Untimely. An appropriate Order consistent with this Memorandum follows.

BY THE COURT:

/S/

GENE E. K. PRATTER
UNITED STATES DISTRICT JUDGE

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ORDER

Gene E.K. Pratter, J.

September 6, 2005

AND NOW, this 6th day of September, 2005, upon consideration of Defendants' Motion to Strike Plaintiff's Expert and Report as Untimely (Docket No. 35), it is hereby ORDERED that the Motion is GRANTED as uncontested.² Therefore, the report of Dr. John Peters shall not be considered as evidence and Dr. Peters is prohibited from testifying at trial.

BY THE COURT:

/S/_____
GENE E.K. PRATTER
UNITED STATES DISTRICT COURT

² Defendants filed this Motion on August 8, 2005. Plaintiff had fourteen (14) days, pursuant to Local Rule 7.1(c), to respond to this Motion, to wit August 22, 2005. No response was timely filed. Pursuant to Local Rule 7.1(c), a Motion in which no response is timely filed "may be granted as uncontested."

While the Court is aware this is an extreme sanction, Plaintiff's continual failure to respond timely and to flout the rules of this Court makes this action necessary. Examples of Plaintiff's inappropriate behavior are addressed in the accompanying Memorandum.